APPENDIX A

[Filed August 30, 2000]

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1373

LEONARD APPLEBAUM,
Appellant,

v.

NISSAN MOTOR ACCEPTANCE CORPORATION;
REITENBAUGH ENTERPRISES, INC.

ON APPEAL FROM THE ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Dist. Court No. 97-cv-07256

District Court Judge: The Honorable Norma L. Shapiro

Argued Tuesday, January 11, 2000

Before: BECKER *Chief Judge*, and ALITO and BARRY,
Circuit Judges

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Reitenbaugh Enterpries, Inc.

OPINION OF THE COURT

ALITO, Circuit Judge:

Leonard Applebaum leased two automobiles from Nissan Motor Acceptance Corporation ("NMAC") through a dealership owned and operated by Reitenbaugh Enterprises ("Reitenbaugh"). Applebaum sued NMAC and Reitenbaugh, contending that the early termination provisions in his leases violated the disclosure requirements of the Consumer Leasing Act ("CLA") and Regulation M, which implements the Act. The District Court entered summary judgment in favor of the defendants, and Applebaum took this appeal. We hold that the early termination provisions in the NMAC lease do not comply with the requirements of the CLA: we therefore reverse.

I.

On November 2, 1994, Applebaum signed a 36-month closed-end lease[1] for a 1995 Nissan Maxima. The lease was between Applebaum and Ritenbaugh, but Reitenbaugh promptly assigned the lease to NMAC. Applebaum terminated his 1994 lease approximately 10 months before the end of the 36-month term in order to trade in his 1995 Maxima for a 1997 model. As is common with automobile leases, NMAC's standard closed-end motor vehicle lease agreement imposed a penalty for early termination. The lease provided:

> First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge which I will pay to you immediately. If there is an excess, however, you will not refund it to me.

1994 Lease, App. at R3; 1997 Lease, App. at R4-5. In the course of negotiating the 1997 lease, Reitenbaugh quoted Applebaum a pay-off figure of $18,111. Reitenbaugh explained that after a trade-in allowance of $12,500 ("the

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[1] A "closed-end" lease is "[a] lease in which [the lessee is] not responsible for the difference if the actual value of the vehicle at the scheduled end of the lease is less than the residual value," but the lessee "may be responsible for excess wear and excess mileage charges and for other lease requirements." Federal Reserve Board Leasing Language (last updated March 29, 2000).

<http:// www.federalreserve.gov/pubs/leasing/glossary htm>.

Realized Value") he owed NMAC $5,611 as an early termination charge.[2]

According to Applebaum, he was aware that there would be an early termination penalty but was surprised that it was so large. When he asked Reitenbaugh to explain how it had arrived at the pay-off figure, the dealer responded that it had not performed the calculation and had no idea how the figure had been derived. Reitenbaugh's practice was to call NMAC for the pay-off figure, and the dealer suggested that Applebaum call NMAC and ask how the figure was calculated. Heeding Reitenbaugh's advice, Applebaum telephoned NMAC in early January 1997. Applebaum contends that his conversation with NMAC was equally unhelpful. Without a satisfactory explanation of how NMAC had calculated the early termination charge, Applebaum nonetheless entered into the 1997 lease. The $5,611 charge was capitalized into the lease payments under the 1997 lease.

Applebaum continued to seek an explanation of his early termination liability. Having failed to make headway on his own, Applebaum retained counsel. By letter to NMAC in July 1997, Applebaum's counsel requested a written explanation of how NMAC had arrived at the $18,111 pay-off figure. In reply, NMAC's legal department stated that it could not reconstruct the pay-off calculation because the computer system that performs the calculation does not retain pay-off Information once an account has been terminated. Applebaum's counsel pressed for an identification of the residual value of the vehicle and how that value had been discounted to present value at the rate implicit in the lease using the constant yield method. *See* App. at R-9. NMAC responded that the rate was proprietary and that its prior

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[2] The record shows that the residual value of Applebaum's 1995 Nissan was $15,018.30 and that the rate implicit in the lease was 8.910068. *See* App. at R-55.

disclosures were adequate to satisfy Regulation M. *See* App. at R-10.

Applebaum then sued NMAC and Reitenbaugh, alleging a violation of the Consumer Leasing Act, 15 U.S.C. §§ 1667-1667e. Applebaum contended that the early termination provision of the leases violated the CLA because the formula for computing the early termination charge was indecipherable and because the provision did not define some of the terms it used. The District Court granted summary judgment for the defendants, holding that the CIA and Regulation M require an early termination clause to be "visible to the lessee and in a readable format" but that the clause "need not be simple enough to do the mathematical calculation of the exact amount." Dist. Ct. Op. at 8. The Court concluded that the lease provisions at issue here were not required to explain the constant yield method, a term that was "well known in the industry." *Id.* at 12. Likewise, the Court held that the lease provisions were not required to disclose the vehicles' residual value. This term, the court commented, "is not void of meaning to the average consumer; it means whatever value remains in the vehicle when the lease terminates." *Id.* at 15. "The CLA and Regulation M," the Court added, "do not require further definition." *Id.* Applebaum then took this appeal.

II.

In 1976, In response to an emerging trend toward automobile leasing, Congress passed the Consumer Leasing Act ("CLA"), 15 U.S.C. § 1667-1667e as Chapter 5 of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1607 *et seq.* The CLA was intended "to assure a meaningful disclosure of the terms of leases of personal property for personal, family, or household purposes so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure

meaningful and accurate disclosures of lease terms in advertisements," 15 U.S.C. § 1601(b). The Senate Report accompanying the CLA stated that "[t]he purpose of the legislation is to provide consumers with meaningful information about the component and aggregate costs of consumer leases, so that they can make better informed choices between leases, and between leases and credit sales." *See* S. Rep. No. 94-590 (1976), *reprinted in* 1976 U.S.C.C.A.N. 431, 432.

The Federal Reserve Board has been given the authority to issue rules implementing the CLA, *see* 15 U.S.C. § 1604, and the Board has exercised that authority by promulgating "Regulation M," 12 C.F.R § 213 *et seq.* (In this case, we consider the version of Regulation M in effect prior to the 1996 amendment now in force.)[3] The Board's staff has also issued official commentary regarding these provisions. In *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980), the Supreme Court instructed that the Board's interpretation of the TILA and Regulation M should be accepted so long as they are "not irrational."[4]

The CLA provides in pertinent part as follows:

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and *in a*

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[3] In 1996, the Federal Reserve Board revised Regulation M and issued new commentary. Although these revisions became effective on October 31, 1996, compliance was optional until October 1, 1997. Applebaum does not contend that these new provisions apply in this case.

[4] *Ford Motor Credit Co.* was decided before *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), but we interpret *Ford Motor Credit Co.* to mean that the Board's interpretation of the TILA is governed by *Chevron* and that its interpretation of its own regulations is governed by *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413-14 (1945).

clear and conspicuous manner the following information with respect to that lease, as applicable:

* * *

(11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the *amount or method of determining any penalty* or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a(11) (emphasis added).

The version of Regulation M in effect at the time in question required that lessors' disclosures "be made clearly, conspicuously, in meaningful sequence, and in accordance with the further requirements of this section." 12 C.F.R. § 213.4(a)(1) (1995). The Official Staff Commentary for this provision explained that "clearly, conspicuously, and in meaningful sequence" required "that disclosures be in a reasonably understandable form." 12 C.F.R. Pt. 213, ¶ 4(a)(1). This Commentary added that "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." *Id.*

With respect to provisions imposing an early termination penalty, Regulation M mandated that the lessor provide:

> A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the *amount or method for determining the amount* of any *penalty* or other *charge for early termination.*

12 C.F.R § 213.4(g)(12) (1995) (emphasis added).[5]

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[5] We note that provisions of Regulation M that were added in 1996 and that are now in effect address the chief issues that are presented in this case. The new Staff Commentary specifically states that a lease need only

III.

A.

Applebaum argues that ¶ 17 of the 1994 Lease and ¶ 18 of the 1997 Lease (collectively "the Leases") violate the CLA and Regulation M because their disclosures regarding the early termination charges are not set out "in a clear and conspicuous manner." Applebaum contends that the early termination provision is "so indecipherable that virtually no reader could comprehend it." Appellant's Br. at 21. Applebaum suggests that the Second Circuit's per curiam opinion in *Lundquist* v. *Security Pacific Automotive Financial Services*, 993 F.2d 11 (2d Cir. 1993), properly interpreted the meaning of the CLA's "clear and conspicuous manner" requirement. In *Lundquist*, the Court held that the early termination disclosures of an automobile lease agreement violated the CLA because they were "confusing, unduly complicated, and unnecessarily convoluted" and "beyond the understanding of the average consumer." *Lundquist*, 993F.2d at 15.

Lundquist was sharply criticized by the Seventh Circuit in *Channell v. Citicorp Nat'l Servs., Inc.*, 89 F.3d 379, 383 (7th Cir. 1996). The Seventh Circuit confronted a challenge to a lessor's method of determining unearned interest in an early termination clause. The lessee asserted that a reference in the lease to the "Sum of the Digits" method was "incomprehensible to the average consumer and therefore violated the requirement that disclosures be clear and conspicuous." *Id.* at

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name the method of discounting to present value that it uses and need not explain how that method works. *See* 12 C.F.R. Pt. 213, ¶ 4(g) (2000).

In revising Regulation M, the Board specifically considered whether to require disclosure of the rate implicit in the lease but ultimately decided not to do so. *See* FRB Final Rule, 61 FR 52246, 52254-56 (Oct. 7, 1996). However, the revised version of Regulation M requires disclosure of residual value in both open- and closed-end leases. *See* 12 C.F.R § 213.4(f)(4) (2000).

381. Noting that 12 C.F.R § 213.4(g)(12) could be satisfied by disclosing the "method of determining the amount of any penalty or other charge for early termination," the Court concluded that "only the method, and not the way the method works, needs to be disclosed." *Id.* at 382. The Court stated:

> It is hard to read the statute and regulation any other way. "Clear and conspicuous manner"—the language of § 1667a—means visible, not simple. "Manner" refers to the mode of presentation, not the degree of comprehension. The Act and Regulation M do not define "clear and conspicuous," but the words are staples of commercial law. The Uniform Commercial Code defines "conspicuous" as "so written that a reasonable person against whom it is to operate ought to have noticed it." UCC § 1-201(10). A disclaimer of the warranty of merchantability is enforceable if conspicuous, *see* UCC § 2-316(2), even if the average consumer hasn't the vaguest idea what a "warranty of merchantability" entails. Regulation M calls for the use of 10-point type at a minimum. § 12 C.F.R. 213.4(a)(1).

Id.

Turning to *Lundquist*, the Court observed:

> We confess to substantial difficulty deciphering the opinion in *Lundquist*. . . . The court does not explain why the operation of a formula must be simple—for the Act requires a clear presentation but does not limit the number of variables the lessor may consider. The quoted words "confusing, unduly complicated, and unnecessarily convoluted" lack a source—they are not quoted from anything, and a search of a database containing all federal opinions of the last 50 years did not turn up any other uses of that phrase. It does not appear anywhere in the United States Code or the Code of Federal Regulations.

Id. at 383.

B.

Under 15 U.S.C. § 1667a(11), the leases at issue in this case were required to disclose either the "amount or method for determining" the early termination charge. Since the amount was not disclosed, the critical question is whether the "method" was revealed in the way that the law demands. Under 15 U.S.C. § 1667a, this disclosure had to be effected "in a clear and conspicuous manner."

The term "conspicuous" is unambiguous. In ordinary usage, it means "obvious to the eye" or "plainly visible." Webster's Third New International Dictionary 485 (1971). *See also Channell*, 89 F.3d at 381 (citing similar definition in UCC § 1-201(10)). Here, Applebaum does not contend that the disclosures in the early termination provision were not "conspicuous."

The term "clear," on the other hand, may be interpreted in several different ways. Among other things, it may mean: (1) "easily visible or distinguishable," (2) "without misconception, error, or vagueness," or (3) "easily understood." Webster's Third New International Dictionary 419. In § 1667a, the term "clear" might refer to the physical characteristics of the printing used in the lease, or it might refer to the characteristics of the language used in making the required disclosures. If the *Channel* opinion suggests that the first meaning is the only possible one, *see* 89 F.3d at 382 (" 'Clear and conspicuous'—the language of § 1667a—means visible . . . ."), we respectfully disagree. Because the statutory language is ambiguous, it is appropriate to consider the Federal Reserve Board's interpretation of this provision.

The Board's Official Staff Commentary adopts an interpretation that refers to the characteristics of the language used in making the disclosures. This Commentary states that disclosures must be made "in a reasonably understandable form." 12 C.F.R. Pt. 213, ¶ 4(a)(1) (1995). "Understandable" means more than "legible"; many things are legible but not

understandable. It is therefore apparent that the Official Staff Commentary interprets the term "clearly" to refer to meaning, not just appearance. We defer to this interpretation. We thus hold that disclosure of the method of calculating an early termination penalty must not only be legible; it must also be "reasonably understandable."

To say that the language used in a disclosure must be cast in "reasonably understandable form," however, is not to say that the meaning of this language must be within "the understanding of the average consumer," as the Second Circuit has suggested. *Lundquist,* 993 F.2d at 15. Here, as in other areas of the law, what is reasonable depends on the surrounding circumstances. Thus, the CLA and Regulation M require disclosure in a form that is "reasonably understandable" in light of the inherent difficulty or complexity of the method described; they do not necessarily demand disclosure in a form that the average consumer can understand. We recognize that some methods used in calculating early termination penalties involve math that is well beyond the understanding of the average consumer. If 15 U.S.C. § 1667a and 12 C.F.R. § 213.4 (1995) meant that any method of determining an early termination penalty had to be capable of explanation in a way that the average consumer could understand, these provisions would in effect impose substantive restrictions on the methods that a lessor could employ. It is plain, however, that these provisions were not intended to impose any such substantive restrictions.[6]

C.

With these standards in mind, we turn to the leases at issue here. As previously noted, they provide in pertinent part as follows:

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[6] To clarify, we mean that disclosure must be cast in a form that is reasonably understandable in light of the difficulty of the matter being disclosed. The benchmark is the nature of the matter discussed.

> First, all monthly lease payments, which under the terms of my lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield Method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which you receive for the vehicle. The balance due you is the Early Termination Charge.

App. at R3, R4-5.

This language plainly satisfies one of the requirements set out in the Federal Reserve Board Staff Commentary, *viz.*, this language "does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, ¶4(a)(1) (1995). On the contrary, the relationship of the terms is easy to grasp:

> **Early Termination Charge=Adjusted Lease Balance-Realized Value.**
>
> **Adjusted Lease Balance** = (**Residual Value**+unpaid present value) discounted to present value at the **Rate Implicit in the Lease** using the **Constant Yield Method**.

If the terms "constant yield method," "rate implicit in the lease," and "residual value," were "reasonably understandable," the method used in calculating the early termination penalty would be as well. We therefore consider those specific terms.

IV.

Applebaum contends that the terms "constant yield method," "rate implicit in the lease," and "residual value" should have been explained in the leases. The version of Regulation M in effect at the time in question required leases covered by the CLA to disclose numerous categories of specific information, *see* 12 C.F.R § 213.4(g)(1)-(15) (1995), but Regulation M did not specifically require a definition or description of any of these terms.

Constant Yield Method

The "constant yield method" is a technical term with a specified meaning. A Federal Reserve Board webpage that explains terms related to vehicle leasing defines the constant yield method as follows:

> The method of earning rent charges in which the rent charge earned each month is proportional to the remaining lease balance. Under this method, the lessor or assignee earns rent charges at an equal rate over the term, similar to most home first mortgages.

Federal Reserve Board, Leasing Language (last updated March 29, 2000) ***<http://www.federalreserve.gov/pubs/leasing/glossary.htm.>***. Use of this method, however, is not easy. See, e.g., 26 C.F.R. § 1. 1272-1 (b) (setting out steps for using constant yield method for certain tax purposes). In all likelihood, the vast majority of lay persons could not discount to present value using the constant yield method even if a description were provided. "A beneficial set of disclosure rules gives the consumer information that can be put to use, while withholding technical information that distracts attention from the rest of the disclosures." *Channel,* 89 F.3d at 382.

Under these circumstances, we hold that simply disclosing that the "constant yield method" was used, without attempting to explain how to use this method, satisfied the "reasonably understandable" requirement. Although the Official Staff Commentary to the current version of Regulation M does not change the law retroactively, we are persuaded by the staff's determination that simply naming an established method of discounting to present value, without attempting to explain the method in the lease itself, is sufficient to make a lease reasonably understandable for present purposes. This commentary states:

> [f]or purposes of the early termination charge a lessor may use the name of a generally accepted method of computing the unamoritzed cost portion (also known as the "adjusted lease balance") of its early termination charges. For example, a lessor may state that the "constant yield" method will be utilized in obtaining the adjusted lease balance

12 C.F.R. Part 213, ¶ 4 (g) (2000).

Rate Implicit in the Lease

Every discounting method must employ some discount rate, but early termination provisions rarely set forth such a rate. The presumption in these leases, apparently, is that whatever the named discounting method it will be carried out at the rate implicit in the lease. We view the leases' reference to the rate implicit in the lease as surplusage, since NMAC would have been required to discount at the rate implicit in the lease even in the absence of such a reference. We also note that the Board has declined to impose an obligation that lessors disclose the lease rate after giving the question considerable thought and attention. *See* FRB Final Rule, 61 FR 52246, 52254-55

Residual Value

Although the NMAC leases use the concept of "residual value" in calculating the early termination penalty, the leases do not define that term or specify the vehicles' residual value. What is more, neither Reitenbaugh nor NMAC provided this information to Applebaum or his attorney, despite their requests.[7]

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[7] We note that even had Reitenbaugh or NMAC provided Applebaum with the residual value upon his request, it would not have cured their disclosure violation. The duty to disclose under the CLA is breached, if at all, at the time of lease consumption. 15 U.S.C. § 1667a.

"Residual value," like the constant yield method, is a term with an established meaning in the leasing field. The Federal Reserve Board's webpage defines the term as follows: "The end-of-term value of the vehicle established at the beginning of the lease and used in calculating your base monthly payment . . . ." Federal Reserve Board, Leasing Language (last updated March 29, 2000) ***<http://www.federalreserve.gov/pubs/leasing/ glossary.htm>***. Similarly, the term is now defined by 12 C.F.R. § 213.2(n) (2000) as "the value of the leased property at the end of the lease term, as estimated or assigned at consummation by the lessor, used in calculating the base periodic payment." Moreover, it is apparent that this is precisely the sense in which the term is used in the NMAC leases. Thus, "residual value" is not "whatever remains in vehicle when the lease terminates", Dist. Ct. Op. at 15; rather, "residual value" is a figure assigned by the lessor at the beginning of the lease.

In order to discharge their disclosure obligations, the defendants in this case were required to reveal the residual value that had been assigned to Applebaum's cars. NMAC knew these figures, and it could have easily disclosed them. Its failure to do so meant that no one—not even a person capable of determining the rate implicit in the leases and capable of discounting to present value using the constant yield method—could have calculated an early termination penalty under the formula set out in the leases. An early termination clause that fails to reveal an otherwise unknowable variable used in determining an early termination penalty[8] cannot be regarded as "reasonably understandable" in any meaningful sense of the term.

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[8] This is distinguishable from information that is unknown to the lessor at the time of lease signing, for which the lessor is permitted to provide a reasonable estimate. *See* 15 U.S.C. § 1667a ('The Board may provide by regulation that any portion of the information required to be disclosed under this section may be given in the form of estimates where the lessor

NMAC's chief argument, which the District Court accepted, is that the Federal Reserve Board, in promulgating the version of Regulation M in effect at the time in question, implicitly determined that closed-end leases, like those involved in this case, did not have to reveal the vehicles' residual value. NMAC notes that the version of 12 C.F.R. § 213.4 (g)(15) in effect at the time required an open-end lease to disclose the vehicle's residual value but that no such requirement was imposed with respect to closed-end leases. Warning against upsetting the FRB's regulatory scheme by imposing a disclosure obligation that the FRB declined to impose, NMAC urges that we not read the absence of a disclosure requirement as

> the result of a lack of prescience; it may instead betoken permission, or perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Ford Motor Credit Co., 444 U.S. at 565.

We reject this argument because it overlooks a critical difference between open- and closed-end leases. An open-end lease is one in which the lessee's liability at the end of the

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is not in a position to know exact information."); 12 ,C.F.R Pt. 213, ¶ 4(d) (1995) ("The lessor may use estimates to make disclosures if necessary information is unknown or unavailable at the time the disclosures are made. . . . Estimates must be made on the basis of the best information reasonably available at the time disclosures are made."). For example, in Applebaum's leases, the early termination charge was a function of the Realized Value of the automobile—*viz.*, the value of the vehicle at the time of lease termination. Because the parties to the lease could not predict when the lease would terminate at the time they entered into the lease, it was sufficient to provide the method for determining Realized Value at lease end. *See* App. at 3.

lease term is based on the difference between the residual value of the leased property and its realized value.[9] Consequently, residual value is always relevant to a lessee's liability in an open-end lease, and the Board thus had a strong reason to require the disclosure of this value. By contrast, lessors need not, and often do not, use the concept of residual value in closed-end leases, and therefore, the Board's failure specifically to require the disclosure of residual value in closed-end leases cannot reasonably be interpreted as a considered decision that disclosure is not necessary to make a closed-end lease reasonably understandable if it uses that term. Here, NMAC constructed its early termination provision in such a manner as to make residual value an essential component of the calculation. Since the leases took this approach, defendants were obligated to disclose this value. They did not do so.

In sum, we hold that the requirement to disclose in a "clear and conspicuous manner" the method of determining the amount of an early termination charge includes an obligation to disclose the value of a variable such as residual value, that is an essential component of the formula used in calculating the charge. Accordingly, we reverse and remand for the entry of judgment in favor of Applebaum and for the award of appropriate relief.

A True Copy
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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[9] *See* 12-C.F.R. § 213.2(j) (2000). We cite this subsequently promulgated provision to show the commonly understood meaning of this term, not because we regard it as legally binding in this case.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

[Filed Apr. 22. 1999]

Civil Action
NO. 97-7256

LEONARD APPLEBAUM
v.

NISSAN MOTOR ACCEPTANCE CORP.
& REITENBAUGH ENTERPRISES, INC.

MEMORANDUM and ORDER

Norma L. Shapiro, S. J. April 21, 1999

The complaint of plaintiff Leonard Applebaum ("Applebaum") alleges defendants Nissan Motor Acceptance Corp. ("NMAC") and Reitenbaugh Enterprises, Inc. ("Reitenbaugh Dealership") violated the Consumer Leasing Act ("CLA"), 15 U.S.C. §§ 1667-1667f. Now before the court are defendants' motions for summary judgment, plaintiff's motion for partial summary judgment, and plaintiff's motion to amend the complaint to add a claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law, 73 Pa. Con. Stat. Ann. §§ 202-1-202-8. For the reasons stated below, defendants' motions for summary judgment will be granted and plaintiff's motion for partial summary judgment will be denied; plaintiff's motion to amend the complaint will be denied without prejudice.

BACKGROUND

On November 2, 1994, Applebaum entered into a closed-end[1] lease with Reitenbaugh Dealership for a 1995 Nissan Maxima ("1994 lease"). On January 20, 1997, Applebaum terminated this lease early and entered into a new closed-end lease for a 1997 Nissan ("1997 lease"). The signed leases were assigned by Reitenbaugh Dealership to NMAC. Both these leases contained an Early Termination Liability clause to govern the lessee's liability in case the lease was terminated before the end of its term.

The early termination clause of each lease states:

> [I]f [the lessee] Terminate[s] early, in addition to the above charges, [the lessee] must pay [the lessor] an Early Termination Charge which is determined as follows; First, all monthly payments, which under the terms of the [the] lease, are not yet due and the residual value of the vehicle are discounted to present value by the Constant Yield method at the rate implicit in the lease (the "Adjusted Lease Balance"). This amount is then reduced by the Realized Value (and insurance) proceeds which [the lessor] receive[s] for the vehicle. The balance due [the lessor] is the Early Termination Charge which [the lessee pays the lessor] immediately. If there is an excess, however, [the lessor] will not refund it to [the lessee].

NMAC calculated the Early Termination Charge for the 1994 lease as $5611, and rolled this amount into the payments under the 1997 lease. Applebaum spoke with Reitenbaugh Dealership and NMAC representatives to ascertain the calculation method for the charge, but they

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[1] A "Closed-end lease" is any lease that is not an "open-end lease" See 12 C.F.R. § 213.2. An "open-end lease" is one in which the lessee is liable for any value the lessor does not recover upon resale of the vehicle at the end of the lease. *See id.*

could not explain the "constant yield method" used in the calculation.

Applebaum filed suit under the CLA for disclosure violations. After discovery, defendants, moving for summary judgment, Asserted that the Early Termination Liability clauses did not violate the CLA; Reitenbaugh Dealership also claimed it was not liable for any violation of the CLA because it had no control over the language of the lease. Plaintiff cross-moved for summary judgment and moved to amend the complaint to assert an additional claim under the Pennsylvania Unfair Trade Practices and Consumer Protection Law.

DISCUSSION

I. Standard of Review

Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A defendant moving for summary judgment bears the initial burden of demonstrating there are no facts supporting the plaintiff's claim; then the plaintiff must introduce specific, affirmative evidence there is a genuine issue for trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-324 (1986). "When a motion for summary judgment is made and supported as provided in [Rule 56], an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in [Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Fed. B. Civ. P. 56(e).

The court must draw all justifiable inferences in the non-movant's favor. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could

return a verdict for the non-moving party." *Id.* at 248. The non-movant must present sufficient evidence to establish each element of its case for which it will bear the burden at trial. *See Matsushita Elec. Indus. Co v. Zenith Radio Corp.*, 475 U.S. 574, 585-86 (1986). The parties in this action cross-moved for summary judgment; no genuine issues of material fact exist, and the court decides the issues as a matter of law.

II. Reitenbaugh Dealership Liability

A lessor is subject to liability if a lease violates the CLA, 15 U.S.C. § l667d; the CLA defines the lessor as "a person who is regularly engaged in leasing, offering to lease, or arranging to lease under a consumer lease." 15 U.S.C. § 1667(3). Reitenbaugh Dealership signed the leases as lessor, and immediately assigned them to NMAC; it contends it did not write the 1994 or 1997 leases or control the language of the leases. The only involvement of Reitenbaugh Dealership with the leases was presenting them to Applebaum for signing.

A dealer acting as an authorized agent for the financier was held liable under the CLA in *Dwyer v. Barco Auto Leasing Corp.*, 903 F. Supp. 205 (D. Mass. 1995). The *Dwyer* court held the dealership liable despite the fact that it had not entered into a lease with the consumer. *See id.* at 210. A "dealer who essentially acts as the financier's authorized agent, completing and forwarding the lease agreement for execution" arranges leases under the CLA. *Id.* Here, Reitenbaugh Dealership engaged in the consumer transaction by presenting the lease to Applebaum, completing it, signing it, and forwarding it to NMAC; Reitenbaugh Dealership cannot avoid joint and several liability merely because it did not actually write the lease language.[2]

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[2] Reitenbaugh Dealership's motion for summary judgment nevertheless will be granted, as this court finds the lease does not violate the CLA as a matter of law.

III. Violation of the CLA

The Consumer Leasing Act ("CLA"), an amendment to the Truth in Lending Act ("TILA"), states in relevant part:

> Each lessor shall give a lessee prior to the consummation of the lease a dated written statement on which the lessor and lessee are identified setting out accurately and in a clear and conspicuous manner the following information with respect to that lease:
>
> > (11) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the term and the amount or method of determining any penalty or other charge for delinquency, default, late payments, or early termination.

15 U.S.C. § 1667a. This provision was in effect at the time both the 1994 and the 1997 leases were signed by the parties.

The TILA "was passed primarily to aid the unsophisticated consumer so that he would not be easily misled as to the total costs of financing." *Thomka v. A.Z. Chevrolet. Inc.*, 619 F.2d 246, 248 (3d Cir. 1980). Plaintiff need not prove he was injured by a failure to meet the disclosure requirements of the Act; injury is presumed from the violation. *Id.* at 250 (quoting *Dzadovsky v. Lyons Ford Sales. Inc.*, 593 F.2d 538, 539 (3d Cir. 1979)). The TILA "should be construed liberally in favor of the consumer." *Ramadan v. The Chase Manhattan Corp*, 156 F.3d 499, 502 (3d Cir. 1998), but deference must be given to interpretations of the Federal Reserve Board, to whom Congress has granted "expansive authority" to promulgate regulations. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 557 & 560 (1980).

Plaintiff asserts defendants' leases have violated the CLA because: 1) the formula to calculate the Early Termination Charge does not comply with the disclosure requirements; and 2) the Early Termination Charge clause fails to define the term "residual value."

A. The Early Termination Charge

In interpreting a statutory provision, a court first considers the language of the statute and whether it clearly expresses the intent of Congress. *See Chevron, U. S .A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984). The CLA is ambiguous regarding whether a closed-end lease must explain or define the "constant yield method." Therefore, we look next to any regulations of an agency to whom Congress expressly delegated authority.

In 1996, Congress granted the Federal Reserve Board ("FRB") power to promulgate regulations under the CLA. *See* 15 U.S.C. § 1667f. Regulation M, 12 C.F.R. § 213.4, addresses disclosure requirements. This formal regulation, as of the date the leases at issue were signed, stated:

> (g) Specific disclosure requirements. In any lease subject to this section, the following items, as applicable, shall be disclosed:
>
> > (12) A statement of the conditions under which the lessee or lessor may terminate the lease prior to the end of the lease term and the amount or method of determining the amount of any penalty or other charge for early termination.

12 C.F.R. § 213.4(g) (12) (1994 & 1995). These "disclosures shall be made clearly, conspicuously, [and] in meaningful sequence." *Id.* at § 213.4(a)(l).

Even when administrative agency interpretations are not formally stated, informal interpretations are given some deference if made "in pursuance of official duty, based upon more specialized experience and broader investigations and information than is likely to come to a judge." *Cleary v. Waldman*, 167 F.3d 801, 807-08 (3d Cir. 1999) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). These interpretations are not controlling, but provide "a body of experience and informed judgment to which courts and

litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140. The interpretation must also be reasonable and "consistent with other agency pronouncements and [in furtherance of] the purposes of the Act." *Cleary*, 167 F.3d at 808.

The 1994 official staff commentary states that "clearly, conspicuously, and in meaningful sequence" means "that disclosures be in a reasonably understandable form," explaining that "while the regulation requires no particular mathematical progression or format, the disclosures must be presented in a way that does not obscure the relationship of the terms to each other." 12 C.F.R. Pt. 213, Supp. I-Cl-l. This requires clarity and full presentation of terms, not full presentation of the details or formulation of a mathematical equation. For the early termination clause to be "clearly, conspicuously, and in meaningful sequence," it must be visible to the lessee and in a readable format; it need not be simple enough for the lessee to do the mathematical calculations of the exact amount.

"[I]f the statute is silent or ambiguous," the court decides "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Regulations promulgated by an agency to whom Congress has expressly delegated authority "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

The parties do not argue that the regulations of the FRB "are arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 844. They are consistent with the CLA and its purpose to protect consumers. Regulation M and the official staff commentary are entitled to deference by this court.

Addressing an identical issue, *Channell v. Citicorp. Nat'l Serv., Inc.*, 89 F.3d 379, 383 (7th Cir. 1996), held that the CLA and Regulation M "permit a lessor to name a method [of

calculation] without providing an elaboration of the method's operation." In *Channell*, the lease referred to use of "the Sum-of-the-Digits method," or "Rule of 78s," to calculate the early termination charge. Plaintiffs argued the CLA required the lease to disclose the calculation by the Sum-of-the-Digits method. The court first considered the plain language of the CLA; a lessor must disclose "the amount or method of determining any penalty or other charge." 15 U.S.C. § 1667a(11); *see also* 12 C.F.R. § 213.4(g)(11) (disclosure of "the amount or method of determining the amount of any penalty or other charge"). The court then balanced the need for disclosure to consumers with the desire to avoid "information overload." *Channell*, 89 F.3d at 382 (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). Finding reference to a method without further explanation of the mathematical calculation permitted the consumer to comparison shop for lease terms, the court concluded that the lease "may disclose either the amount or the method of getting to an amount." *Channell*, 89 F.3d at 382. It held Regulation M required no explanation of the application of the method.[3] *Id.*

The term "clear and conspicuous" is not defined either in the CLA or Regulation M, so the *Channell* court adopted a Uniform Commercial Code § 1-201(10) definition: "so written that a reasonable person against whom it is to operate ought to have noticed it." The court concluded that "clear and conspicuous" means visible or noticeable, not simple or easy to apply. *Channell*, 89 F.3d at 382.

In *Lundquist v. Security Pacific Automotive Financial Servs. Corp.* 993 F.2d 11, 13 (2d Cir. 1993), the court considered the following lease provision:

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[3] The staff commentary to Regulation M now specifically permits the lessor to refer to "a generally accepted method," like the "constant yield method." *See* 12 C.F.R. Pt. 213, Supp. I. This provision is not retroactive so it does not apply to the present action. *Channell*, 89 F.3d at 383.

16. EARLY TERMINATION LIABILITY

At any time after I [the lessee] sign this lease, you [Security Pacific] may terminate it if any of the conditions described in Item 22 occur or this lease is in default as described in Item 23.

I agree that my payment liability upon early termination will be the sum of:

(a) A termination fee of $250; plus

(b) Any monthly lease payments already due you which are unpaid and any other amounts arising from my failure to keep my promises under this lease; plus

(c) The amount, if any, by which the sum of the Adjusted Lease Balance as described in Item 8, plus one Base Payment, Item 3.A., exceeds the Realized Value, as determined in accordance with Item 15; plus

(d) Any official fees and taxes imposed in connection with lease termination (for example, sales/use taxes due on a deficiency balance under (c)).

In interpreting this provision, the *Lundquist* court, after quoting the applicable provisions of the CLA, Regulation M, and the staff commentary, concluded:

> [The] lease disclosures are not reasonably understandable. They are "confusing, unduly complicated, and unnecessarily convoluted." In particular, the termination formula in Item 16(c) of the lease is a Byzantine formula, beyond the understanding of the average consumer.

Id. at 15.

The provision interpreted in *Lundquist* is distinguishable from the one this court is asked to interpret. That provision involved more steps and more complicated calculations, not a method of calculation such as the "constant yield method."

The *Lundquist* court, in granting summary judgment for plaintiff, did not consider whether the CLA requires the lessor to explain a named method. *See Channell*, 89 F.3d at 383. To the extent tension does exist between *Lundquist* and *Channell*, *Channell* seems a better interpretation of the CLA requirements.

The 1994 and 1997 leases were not required to define "constant yield method" because the lessor elected to give the method of calculation rather than an exact amount. The calculation of the Early Termination Charge was stated "clearly, conspicuously, and in meaningful sequence." [4]

The lease provision states each step in the calculation of the early termination charge. Reading the provision, the lessee can easily gather the following formula, or method of calculating the charge:

> 1. (Monthly payments + residual value) (discounted to present value using the "constant yield method") = Adjusted Lease Balance (ALB)
>
> 2 ALB — Realized Value (proceeds the lessor receives for the vehicle) = Early Termination Charge.

The consumer may not understand the meaning of "constant yield method," but the clause is otherwise decipherable. Explaining the "constant yield method," a method well known in the industry, rather than merely naming it would cause more confusion than it resolved. As NMAC stated at oral argument, the mathematical formula is "imbedded in . . . computer software." The purpose of this method under the lease is to discount to present value; this requires complex calculations involving the time value of money. *See* 60 F.R. 48752, 48756. Calculating the time value

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[4] Plaintiff also objects that the lease requires "numerous unnecessary calculations." The CLA and Regulation M do not prohibit unnecessary calculations, nor does plaintiff identify any.

of money mandates some prediction of future events and reliance upon actuarial formulae involving complex mathematics. *See* Casualty Society of Actuaries, *What is an Actuary?* (visited April 19, 1999) <http://www.casact.org/career/what.htm>. The CLA does not require the lessor to explain complex mathematics in the lease; stating the method used satisfies the disclosure requirement.[5]

B. Defining "Residual Value"

At the time of the 1994 lease, neither the CLA nor Regulation M expressly required that key terms be defined in the lease. After January, 1997, the FRB revised Regulation M to require a lessor to define "residual value" when used in calculating the periodic payment, but not in relation to the early termination penalty. *Compare* 12 C.F.R. § 213.4(f) (4) *with* 12 C.F.R. § 213.4(g) (4).

Prior to amendment, the regulation specifically required definition of "residual value" in an open-end lease, 12 C.F.R. § 213.4(g) (15), but not in a closed-end lease, at issue here. The FRB was aware of the use of the term "residual value" in leases when it required the definition in open-end leases but not in closed-end leases.

> But legislative silence is not always the result of a lack of prescience; it may instead betoken permission or, perhaps, considered abstention from regulation. In that event, judges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme. Accordingly, caution must temper judicial creativity in the face of legislative or regulatory silence.

Milhollin, 444 U.S. at 565.

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[5] As of October 1, 1997, if the lessor names a method of calculation in the lease, a lessor must "provide a written explanation of that method if requested by the consumer". *See* 12 C.F.R. Pt. 213, Supp. I. As of the date of the transactions at issue, this provision was not in effect.

Plaintiff cites *Anderson v. Ford Motor Credit Corp.*, 593 A.[2d] 678 (Md. 1991) to support his argument that a closed-end lease must define "residual value." In *Anderson*, a state court allowed lack of disclosure of the term "residual value" in a default clause as a defense when the lessor sued for default payments. The term "residual value" was used to state the method by which the early termination charge, necessary to determine the default charge, was calculated. In interpreting the CLA, the *Anderson* court considered a Senate report requiring full disclosure of charges, Regulation M, and a treatise on the TILA and concluded that "the method or amount in determining the charge must be furnished." *See id.* at 681 (quoting S. Rep. No. 590, 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Admin. News 435; 12 C.F.R. § 213.4(g)(12)); K. Keest & E. Sarason, Truth in Lending, § 9.3.6.12, at 339 (1989).

The *Anderson* court required the lessor to disclose the actual calculated amount of the residual value, not a mathematical explanation or definition of the term. Quoting a treatise on the TILA, the court found that "[w]henever a key number in the early termination formula is left blank or not discussed anywhere in the contract, this is a certain disclosure violation." *Id.* (quoting Keest & Sarason, Truth in Lending, § 9.3.6.12, at 339). The court then mandated disclosure of the actual residual value amount in case of default because "[s]imply telling the lessees that their liability would be predicated upon the residual value, without disclosing that predetermined value in writing, does not satisfy the requirements of § 1667a." *Anderson*, 593 A.2d at 681.

Neither the CLA nor Regulation M require that every "key number" used in calculating a charge be disclosed. *See* 15 U.S.C. § 1667a(11); 12 C.F.R. § 213.4(g)(12). In light of the regulation's silence regarding "residual value," a concept familiar to the FRB, this court is unwilling to interpret the regulation as broadly as plaintiff argues and *Anderson* holds.

Plaintiff fears that if defendants are not required to define the term "residual value" and disclose the amount, defendants may arbitrarily select a value. But Regulation M requires that charges be reasonable, 12 C.F.R. § 213.4(g)(1); an Early Termination Charge cannot be reasonable if the values by which it is calculated are unreasonable. Plaintiff does not contend here that the residual value used was unreasonable. The term "residual values" is not void of meaning to the average consumer; it means whatever value remains in the vehicle when the lease terminates. The CLA and Regulation M do not require further definition.

IV. Amendment of the Complaint

Plaintiff moves to amend his complaint to add a claim for violation of the Pennsylvania Unfair Trade Practices and Consumer Protection Law ("UTPCPL"), 73 Pa. Con. Stat. Ann. § 202-1—202-8. Because this court will grant summary judgment in favor of defendants, it declines exercising supplemental jurisdiction under 28 U.S.C. §1367(c). Plaintiff's motion to amend the complaint will be denied without prejudice.

CONCLUSION

Reitenbaugh Dealership is liable under the CLA as the lessor and an arranger of the lease; it is regularly engaged in leasing. However, the CLA, as interpreted by Regulation M, does not require that defendants explain the "constant yield method" used in the 1994 and 1997 leases signed by Applebaum, nor does the statute require the lessor to define the term "residual value" in a closed-end lease.

This court declines to exercise supplemental jurisdiction over an UTPCPL claim.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
NO. 97-7256

LEONARD APPLEBAUM

v.

NISSAN MOTOR ACCEPTANCE CORP. &
REITENBAUGH ENTERPRISES, INC.

ORDER

AND NOW, this 21st day of April, 1999, upon consideration of plaintiff's and defendants' cross-motions for summary judgment, all responses thereto, and after a hearing during which counsel for both sides were heard, and in accordance with the attached Memorandum, it is hereby ORDERED that:

1. The motion for summary judgment of defendant Nissan Motor Acceptance Corp. is GRANTED.

2. The motion for summary judgment of Defendant Reitenbaugh Enterprises, Inc. is GRANTED.

2. Plaintiff's motion for summary judgment is DENIED.

3. Judgment is entered in favor of defendant and against plaintiff.

4. Plaintiff's motion to amend his complaint is DENIED without prejudice to any action filed in state court.

5. The Clerk is directed to mark this action CLOSED.

Shapiro, S.J

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-1373

LEONARD APPLEBAUM,

Appellant

v.

NISSAN MOTOR ACCEPTANCE CORPORATION;
REITENBAUGH ENTERPRISES, INC.

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, and FUENTES, *Circuit Judges*.

The petition for rehearing filed by appellee in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied.

By the Court,

/s/ [Illegible]
Circuit Judge

Dated: Oct. 25, 2000